

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
2010 Quadrennial Regulatory Review -	)	
Review of the Commission's Broadcast	)	MB Docket No. 09-182
Ownership Rules and Other Rules Adopted	)	
Pursuant to Section 202 of the	)	
Telecommunications Act of 1996	)	

To: The Commission

**REPLY COMMENTS OF SPANISH BROADCASTING SYSTEM, INC.**

Spanish Broadcasting System, Inc. ("SBS") hereby respectfully submits these Reply Comments in response to comments filed in the above-captioned proceeding by Azteca International Corporation ("Azteca") on July 12, 2010.

Limitations on access to capital hamper attainment of the Commission's longstanding goal to promote broadcast ownership by minorities. Enhancement of minority ownership, in turn, is premised on the thesis that diversity in broadcast ownership will translate into diversity in programming, because minorities with attributable interests in or control of broadcast stations have opportunities to meaningfully influence station operations.<sup>1</sup> To facilitate achievement of this longstanding Commission objective, SBS has, in the past, supported a measured approach to relaxation of foreign ownership restrictions, so as to open potential new sources of financing for minority-owned broadcasters.

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<sup>1</sup> See *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Fourth Further Notice of Proposed Rulemaking, 24 FCC Rcd 5896, 5897 (2009). Thus, over 30 years ago, the Commission concluded that "[f]ull minority participation in *ownership and management* of broadcast facilities results in a more diverse selection of programming." *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 981 (1978) (emphasis added).

The proposal set forth in Azteca's comments (the "Azteca Proposal"), rather than promoting *minority* ownership as a means of fostering diversity in programming, instead advocates *alien* ownership – indeed, alien de jure *control* – as an avenue for achieving that purpose. The Azteca Proposal is not about providing much-needed capital to underfunded minority-owned broadcasters, but is about fostering alien ownership (by alien owners who may or may not be minorities).<sup>2</sup> Moreover, the "conditions" Azteca incorporates into its proposal constitute mere window dressing, as explained below. Furthermore, Azteca's claim that its approach is similar to a 2007 proposal advanced by a coalition of organizations calling itself "Diversity and Competition Supporters," which had in turn endorsed a suggestion of the FCC's Advisory Committee for Diversity (the "DCS Proposal"), is disingenuous and misleading. While the DCS Proposal was designed to "help eliminate a barrier to access to capital for domestic minority owned broadcasters,"<sup>3</sup> the Azteca Proposal promotes alien ownership and fails to include any of the important substantive qualifications of the DCS Proposal.

**I. The Azteca Proposal Violates the Communications Act and is Replete with Definitional and Other Problems.**

Azteca characterizes its proposal as one seeking "limited," "incremental" relief of the Commission's ownership rules. Azteca Comments at 1, 10. But the Azteca Proposal, to the extent its confused details can be deciphered, is clearly radical in nature, as well as violative of the Communications Act.

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<sup>2</sup> The ostensible predicate for the Azteca Proposal – that "[t]he *American public* deserves to have media that reflects *its own* diversity" – would in no way be served by granting controlling interests in U.S. broadcast licenses *to aliens*, rather than to minorities who are U.S. citizens. Azteca Comments at 11 (emphasis added).

<sup>3</sup> *Initial Comments of the Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking*, MB Docket No. 06-121, at 37 (filed Oct. 1, 2007) ("DCS Comments").

As formulated in Section III of its comments, the first element of the Azteca Proposal is that the FCC adopt a “presumptive waiver process that would allow foreign entities to own *and control* up to 51% of a U.S. corporation *that holds a broadcast license*.” *Id.* at 10 (emphasis added). Section 310(b)(3) of the Communications Act, however, unequivocally states that “[n]o broadcast . . . license shall be granted to or *held by* . . . any corporation of which more than *one-fifth* of the capital stock is owned of record or voted by aliens,” 47 U.S.C. § 310(b)(3) (emphasis added), and the Commission has no discretion to waive this prohibition. Thus, the first element of the Azteca Proposal would flatly contravene federal law.

Even if Azteca misstated this key element and instead meant to propose a “presumptive waiver” of Section 310(b)(4), rather than Section 310(b)(3), its proposal still runs against the tide of Congressional sentiment and FCC precedent. Section 310(b)(4) states:

No broadcast . . . license shall be granted to or held by . . . any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens . . . if the Commission finds that the public interest will be served by the refusal or revocation of such license.

47 U.S.C. § 310(b)(4).

Historically, in the broadcast context, with one unique exception,<sup>4</sup> the Commission has steadfastly refused to waive the provisions of Section 310(b)(4) to permit alien ownership of a licensee’s parent company in excess of the 25 percent benchmark. The FCC’s approach in the broadcast (as opposed to telecommunications) arena reflects sensitivity to possible alien control of, and undue influence over, programming to be delivered to the American public. As the FCC has stated:

Section 310(b) reflects the broader purpose of safeguard[ing] the United States from foreign influence in the field of broadcasting. The specific citizenship requirements [in the Act] reflect a deliberate

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<sup>4</sup> The exception was the anomalous situation presented fifteen years ago in *Fox Television Stations, Inc.* See 11 FCC Rcd 5714 (1995).

judgment on the part of Congress as to the limitations necessary to prevent undue alien influence in broadcasting.

*Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended*, 103 FCC 2d 511, 516-17 (1985), *mod.* 1 FCC Rcd 12 (1986) (internal quotations and citations omitted).

In an attempt to turn on its head the historical presumption against waiver of Section 310(b)(4) in the broadcast context, Azteca proposes a presumption *favoring* indirect alien ownership – up to and including a *controlling* interest – if certain nominal prerequisites are met. Such an approach does little to advance minority ownership and does not feature the numerous important limitations of the DCS Proposal. Its adoption would open the floodgates to alien control of broadcasting.

In an apparent effort to temper its proposal to allow alien control of broadcast stations, Azteca suggests (a) that licenses be “held by a U.S. corporation with a board of directors comprised of at least two U.S. citizens, one of whom is independent of the foreign company,” (b) that stations owned by alien-controlled licensees “target” a “majority” of their programming “at an underserved audience of racial, ethnic or language minorities not generally targeted by major broadcast networks,” and (c) that “station ownership compl[y] with all other FCC multiple- and cross-ownership rules.” Azteca Comments at 10. SBS respectfully submits that these conditions – which are either illusory or will be problematical to apply in practice – will do virtually nothing to offset alien control of broadcast stations.

Azteca’s proposed board of directors requirement is confusing, but meaningless no matter how interpreted. Specifically, Azteca calls for “at least two U.S. citizens” to serve on the board of an *alien-controlled* licensee. Any board of directors, however, can be replaced by majority ownership, which in this case would be alien controlled. Furthermore, the Azteca Proposal leaves unanswered the question of how many total directors would serve on such a board. A two-person

board of directors makes no practical sense, as it is prone to unproductive deadlock. A larger board would simply render the U.S. directors largely superfluous. With a nine-person board, for example, the Azteca Proposal would leave open the possibility of an alien-dominated board: seven alien directors, one U.S. director affiliated with the controlling alien entity, and one independent U.S. director.

Azteca's second condition is that "a majority of the station's programming is targeted at an underserved audience of racial, ethnic or language minorities not generally targeted by major broadcast networks, such as African-Americans, Latinos and Asian-Americans." *Id.* But this content-based restriction raises more questions than it answers. What is a "majority," and how would it be calculated – by number of programs, hours of broadcast, or some other method? What is the meaning of "targeted," and how does the FCC decide if a program "targets" a certain demographic? At what point does an "underserved audience" become "adequately" or "fully" served? Are such service benchmarks calculated nationally, by market, or using some other tool of geographic measurement? What is a "major broadcast network"? Are Univision and Telemundo such "major" networks? If a licensee operates multiple stations, only some of which comply with the content-based restriction, will the licensee and/or its parent corporation qualify for the waiver? Clearly, in addition to the First Amendment concerns which are unavoidable when the government attempts to impose content-based imprimaturs, these unanswered questions reflect the subjective and unworkable nature of Azteca's conditions.

Azteca's third condition is that "station ownership [must] compl[y] with all other FCC multiple- and cross-ownership rules." *Id.* This is perhaps the mother of all meaningless constraints. Plainly, all FCC licensees are required to comply with the Commission's multiple- and cross-ownership rules, regardless of whether they are alien-controlled.

## II. The Azteca Proposal Goes Well Beyond the DCS Proposal.

Azteca attempts to align its proposal with a 2007 proposal advanced by the Diversity and Competition Supporters, which had urged adoption of a waiver policy formulated by the Advisory Committee on Diversity for Communications in the Digital Age. But important and substantive differences between the two proposals, unremarked by Azteca, are readily apparent.<sup>5</sup>

The principal purpose of the DCS Proposal was to propose a mechanism for waiving Section 310(b)(4) so that “*non-controlling foreign investment (e.g., up to 49%) could be permitted where the investment would help eliminate a barrier to access to capital for domestic minority owned broadcasters.*” *DCS Comments* at 37 (emphasis added). The Azteca Proposal has quite a different focus. Azteca proposes permitting *a controlling level of alien investment, up to and including 51%*. *Azteca Comments* at 10. Moreover, the Azteca Proposal contains no condition, assurance or purpose of providing foreign capital to domestic minority-owned broadcasters. Rather, Azteca would allow funding to flow freely from aliens to *any* Commission licensee, regardless of its size or level of minority ownership, so long as the stations involved “target” a “majority” of their programming at “an underserved audience,” and seat two U.S. citizens on their boards. *Id.* In sum, the Azteca Proposal would allow alien *control* over *any* U.S. broadcaster, whether or not minority-owned.

The DCS Proposal also contains numerous safeguards to address national security, law enforcement, trade and foreign policy concerns, all of which are absent from the Azteca Proposal. For example, the DCS Proposal specifies that only aliens from WTO member nations would be presumed to satisfy the waiver standard, which presumption could be rebutted if an alien investor’s home nation does not provide reciprocal treatment for U.S. investors. While alien

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<sup>5</sup> SBS is quite familiar with the DCS Proposal, having endorsed it along with a group of Spanish-language broadcasters. See *Reply Comments of Spanish Language Broadcast Companies in Response to the Second Further Notice of Proposed Rulemaking*, MB Docket No. 06-121 (filed Nov. 1, 2007) (“*Spanish Language Broadcast Companies Reply Comments*”).

equity participation could reach 49%, alien voting interests would generally be limited to 25%, unless the alien investors are from a NAFTA or Caribbean Basin Initiative nation, in which case only 49% of voting power would be permitted. But in no circumstance would alien ownership *control* be permitted under the DCS Proposal. By contrast, under the Azteca Proposal, aliens from *any* foreign locale could own *and control* U.S. broadcasters, so long as two U.S. citizens served on their boards, and they “targeted” programming to minority groups.

**III. Azteca Disregards the Distinction Between Foreign Investment in Common Carriers and Foreign Investment in Broadcasting.**

Azteca laments what it regards as an inequity between the FCC’s relatively liberal treatment of foreign investment in common carriers, and the agency’s historically strict enforcement of Section 310(b)(4) in the broadcasting context. *See id.* at 8. Azteca, however, fails to recognize the distinct public interest considerations that apply to the two arenas and account for the FCC’s historically more restrictive posture toward alien ownership in broadcasting.

Broadcasting is an industry rooted in the provision of information, news and entertainment to local communities. The FCC consistently and repeatedly has championed service to local communities as critical to the nation’s system of broadcasting. The common carrier industry, on the other hand, has no analogous obligation to provide local community service. Common carriers operate in a largely undifferentiated, unitary global market, driven by a primary public interest goal of fostering competition. *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891 (1997).

The reason for the FCC’s disparate treatment of foreign investment in the two industries is readily apparent. In broadcasting, the Commission is concerned about preserving and promoting a licensee’s television or radio service to its local community; in particular, news, information

and responsiveness to issues of local importance. Alien control is facially inconsistent with the provision of such service, since alien owners are axiomatically not “local.” For common carriers, the concern is different: the Commission is concerned about how foreign investment affects competition, and whether common carriers that are bolstered by infusions of foreign capital present possible risks to competition.

In 1997, the United States and 68 other nations entered into the World Trade Organization Basic Telecommunications Agreement, the primary goal of which was to forge a reciprocal opening of markets for telecommunications – primarily common carrier services – and thereby to promote increased domestic competition. With the signing of this agreement, anxiety about the potentially disruptive effect of indirect alien investment in the domestic common carrier market largely dissipated as to investors from other WTO member countries. The Commission therefore adopted a presumption potentially allowing for indirect alien control by investors from WTO member nations of common carrier radio licensees, implemented by waivers of the 25% benchmark of Section 310(b)(4).

There is no similar international treaty regarding alien investment in domestic broadcasting. Given this, and the widely disparate public interest considerations and regulatory structures historically applicable to the two industries, it is wholly understandable that the Commission treats foreign investment differently in the two sectors. While SBS supports relaxation of alien investment in broadcasting along the lines of the DCS Proposal, it opposes the Azteca Proposal which advocates or allows for alien control, with no design to enhance minority ownership of broadcast stations.

**IV. Alien Investors Currently Have Investment Opportunities in Domestic Broadcasting, Which Could be Enhanced through Measures Less Drastic than Azteca’s.**

Sophisticated alien investors currently have opportunities to invest in U.S. broadcasting companies through of a number of permissible mechanisms which do not run afoul of the



statutory limitations. First, Section 310(b) on its face permits a significant amount of alien investment – direct or indirect ownership or voting rights of up to 25% in a corporation controlling the licensee of a broadcast station, and up to 20% in the licensee itself. Ownership interests at the licensee level and the holding company level are not aggregated; alien investors may own 20% of the equity and votes of a licensee entity and an additional 25% of the equity and votes in a holding company.

While voting rights and equity ownership by aliens are subject to these benchmarks, Section 310(b) does not apply to contingent or future interests such as warrants, options and similar rights. Moreover, there is no restriction on debt holdings, such as convertible debentures or similar instruments, and such instruments may be used to increase an alien investor's financial stake in a broadcast venture. Acquisitions involving multi-faceted companies, such as a programming network that also owns broadcast stations, can be structured in a manner in which the station group is separated from the programming arm, and substantially higher levels of alien ownership can be made in the business entity that does not own the licenses.<sup>6</sup>

These existing opportunities for alien investment in domestic broadcasting can, and should, be augmented through measures less drastic than the Azteca Proposal. Adoption of a more measured approach, such as that proposed by DCS, that is designed to enhance the flow of capital directly to domestic minority-owned broadcasters, is one such means. Another important step would be to secure Congressional reauthorization of a tax certificate program. As SBS has noted in prior filings with the Commission, this program would “provide the Commission with a continued mechanism to fulfill Congress’s mandate under the Communications Act to

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<sup>6</sup> Azteca notes that “[t]here is an untapped pool of equity spanning the globe that would like nothing more than an opportunity to invest in *broadcast networks* targeting underserved populations in the United States.” Azteca Comments at 9 (emphasis added). That opportunity exists now. There is nothing in the Communications Act or the Commission’s rules that limits foreign investment in “broadcast networks.”

‘eliminat[e] market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services,’” and “promote the policies and purposes of this Act favoring diversity of media voices . . . .” *Spanish Language Broadcast Companies Reply Comments* at 4 (quoting 47 U.S.C. §§ 257(a) and (b)). SBS believes that such a tax certificate program would benefit small disadvantaged businesses, thus promoting minority ownership and programming diversity, and encourages the Commission to take the lead in securing its Congressional reauthorization.

**V. Conclusion.**

SBS shares Azteca’s concern regarding minority broadcasters’ limited access to capital. It supports measured relaxation of alien ownership restrictions, such as that advocated by the carefully constructed DCS Proposal, so as to promote additional financing opportunities for domestic minority broadcasters. But SBS opposes the Azteca Proposal to grant alien control over broadcast licensees and/or their parent companies, which does nothing to enhance minority ownership of broadcast stations.

Respectfully submitted,

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